IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 15, 2005 Session

ROBERT RAY JOYCE v. ROBIN SUE COLLINS, ET AL.

Appeal from the Chancery Court for Hamblen County
No. 2004-469 William H. Inman, Senior Judge

No. E2005-01177-COA-R3-CV - FILED FEBRUARY 16, 2006

This litigation is essentially[1] a dispute between siblings – the plaintiff Robert Ray Joyce ("Joyce Son") and the defendant Helen Joyce Grooms ("Joyce Daughter")[2] – the surviving children of Robert C. Joyce ("the deceased"). Joyce Son filed this action alleging (1) that his sister, Joyce Daughter, secured the execution of their father's power of attorney by exercising undue influence over him; and (2) that Joyce Daughter's transfer of the deceased's real estate to her husband, the defendant James Grooms – which deed was executed during the deceased's lifetime, and, according to Joyce Daughter, in her father's presence and at his direction – was intended to deprive Joyce Son of his share of the deceased's estate. The trial court set aside the deed, stating that the transfer was made without consideration and in gross violation of the applicable statutes. Joyce Daughter and her husband appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Mitzi L. Sweet, Morristown, Tennessee, for the appellants, Helen Joyce Grooms and James Grooms.

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[1] Robin Sue Collins was also sued in this action. She is the adult daughter of the defendants, Helen Joyce Grooms and James Grooms. The complaint alleges that the daughter, acting as *Joyce Son's* attorney in fact, inappropriately withdrew money from his bank account, transferred land owned by him into her name, and made various personal charges on his credit card accounts. The trial court held that, as a result of these actions, the daughter had violated her fiduciary duty. The court awarded Joyce Son a judgment against the daughter for the various personal expenses she had charged to his credit cards. She was also ordered to reconvey his real estate to him. The daughter did not appeal.

[2] While the references to Joyce Son and Joyce Daughter are somewhat clumsy, we have used them because they clearly distinguish between the main participants in the part of this litigation now on appeal.

Denise Terry Stapleton, Morristown, Tennessee, for the appellee, Robert Ray Joyce.

OPINION

I.

For several years preceding this litigation, Joyce Son, who the trial court found to be mentally competent but "somewhat surreally disadvantaged," resided in a mobile home located on 20 acres of land owned by the deceased.[3] The deceased lived with Joyce Daughter and her husband, but he paid Joyce Son's utility bills and helped him with other expenses.

On March 1, 2004, the deceased, who, according to the testimony, was mentally competent at all relevant times, executed a durable power of attorney, naming Joyce Daughter his attorney in fact. The powers enumerated in Tenn. Code Ann. § 34-6-109 were incorporated into the power of attorney by reference. In addition, the power of attorney stated that Joyce Daughter "may make gifts on my behalf." The document was signed by the deceased and duly notarized. On the same day, the deceased executed a will, leaving the 20-acre tract upon which Joyce Son lived to Joyce Daughter. The deceased's will also stated that Joyce Daughter was "to pay all expanes [sic] to [Joyce Daughter's husband] . . . . That [sic] he invested on [sic] the property." The will had not been probated at the time of the hearing below.

On or about April 5, 2004, Joyce Daughter, in her capacity as attorney in fact for the deceased and in his presence, executed a quit claim deed, transferring the aforesaid 20-acre tract to her husband. According to Joyce Daughter, the deceased "told [her] to do it that way." The husband paid no consideration for the transfer. The deceased died on June 13, 2004. Sometime after the deceased's death, Joyce Daughter and her husband initiated steps to evict Joyce Son from the 20-acre tract. Mr. Grooms also made arrangements with an auction company to sell the 20-acre tract.

Joyce Son subsequently filed this suit for declaratory judgment and damages, alleging, *inter alia*, that Joyce Daughter had exercised undue influence on the deceased to secure his power of attorney, and that the transfer of the deceased's property should be set aside because it benefitted Joyce Daughter and her husband and was intended to deprive Joyce Son of his lawful share of the deceased's estate. At the hearing in this case, the trial court ruled in favor of Joyce Son, setting aside the deed transferring the deceased's property to Joyce Daughter's husband because, as the trial court stated, the transfer was "without consideration and in gross violation of the statutes." Joyce Daughter and her husband appeal this ruling.

[3] Sometime prior to his death, the deceased gave Joyce Son a parcel of land and a house across the road from the 20-acre tract. The testimony suggests that Joyce Son used this deeded property for rental income; he resided, however, on the 20-acre tract.

II.

Our review of this non-jury case is *de novo* upon the record of the proceedings below with a presumption of correctness as to the trial court's factual findings, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). The trial court's conclusions of law are not accorded the same deference. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III.

Joyce Daughter and her husband mount a two-pronged attack on the trial court's decision. First, they assert that the trial court erred in holding that Joyce Daughter's transfer of the deceased's property to her husband was in "gross violation" of the applicable statutes. Second, assuming that we find no error with respect to their first issue, and in apparent anticipation of Joyce Son's argument of undue influence, they assert that the trial court never ruled on this latter issue. In any event, they contend that the record is completely devoid of any proof of undue influence.

IV.

Joyce Daughter and her husband first argue that the trial court erred in determining that Joyce Daughter's transfer of the deceased's 20 acres of property to her husband was in "gross violation" of Tenn. Code Ann. §§ 34-6-108 and 34-6-109 (2001). Tenn. Code Ann. § 34-6-109 enumerates certain powers that can be granted to an attorney in fact without judicial authorization, "subject to all other provisions of the [power of attorney]." ***Id.*** The power to gift or transfer without consideration is not one of the powers enumerated in this code provision. ***Id.*** However, Tenn. Code Ann. § 34-6-108 provides, in pertinent part, as follows:

> (a) Upon the principal clearly expressing an intention to do so within the instrument creating a power of attorney, the language contained in § 34-6-109 may be incorporated into such power of attorney by appropriate reference. The provisions so incorporated shall apply to the attorney in fact with the same effect and subject to the same judicial interpretation and control in appropriate cases, as though such language were set forth verbatim in such instrument.
>
> (b) Nothing contained in this section and § 34-6-109 shall be construed to limit the power of the principal [] to:
>
> (1) Grant any additional powers to the attorney in fact, *including any powers otherwise excluded under subsection (c)*;
>
> * * *

> (c) Nothing contained in this section and § 34-6-109 shall be construed to vest an attorney in fact with, or authorize an attorney in fact to exercise, any of the following powers:
>
> (1) Make gifts, grants, or other transfers without consideration, except in fulfillment of charitable pledges made by the principal while competent;
>
> * * *

Tenn. Code Ann. § 34-6-108 (emphasis added). As can be seen from the above, the language of subsection (b)(1) provides that neither Tenn. Code Ann.§ 34-6-108 nor § 34-6-109 is to be interpreted so as to limit the power of a grantor, by express grant, to "trump" the restrictions of subsection (c) of Tenn. Code Ann. § 34-6-108. *See* ***Prudential Ins. Co. of Am. v. Cannon***, No. 01A01-9406-CH-00266, 1995 WL 152536, at * 7 (Tenn. Ct. App. M.S., filed April 7, 1995); ***Crowell v. Carrick***, No. 01-A-019301-CV-00025, 1993 WL 236659, at * 1 (Tenn. Ct. App. M.S., filed June 30, 1993). One of these restrictions is a prohibition against the making of "gifts, grants, or other transfers without consideration." Tenn. Code Ann. § 34-6-108 (c)(1).

We find the following exchange, taken from the transcript of the hearing below, particularly relevant to the first prong of Joyce Daughter's first issue:

The Court:	What was [Joyce Daughter's] color of title, . . . ? How could she [transfer the 20-acre tract to her husband]?
Counsel for Joyce Son:	I – The way I read her – what a power of attorney can do, I don't think she can. I don't think she had grounds to do it.
Counsel for Joyce Daughter and her husband:	Your Honor, I object to that. Anybody that's got designated power – to put in a power of attorney anything they want done, except break the law. I mean, I can have a power of attorney to do anything. And it's not unusual for a father to have – give power of attorney to a child to dispense his estate prior to death.
The Court:	Okay.

* * *

The Court:	All right. The chief question I'm wrestling with here, now, is your contention that – that [Joyce Daughter] could not lawfully transfer this property owned by [the deceased], pursuant to this power of attorney dated March the 1st, 2004. Now is that your – Do I understand that correctly?
Counsel for Joyce Son:	Yes, your Honor. Yes, your honor. I think we've shown a pattern —
The Court:	All right. Now, but where is the evidence that she could not do that. The power of attorney purports to give her that right.[4]

[4]The court was apparently referring to the broad general language of the power of attorney:

* * *

> . . . to be my true and lawful attorney, for me and in my name, place and stead to do any act, or thing, as fully, completely, and amply, to all intents and purposes whatsoever as I might or could do as acting personally, without limitation.

* * *

> I have set forth certain powers expressly, however, I do not intend to limit this general power of attorney by doing so, and state again that my attorney may do, sign, or perform any other act, deed, matter or thing whatsoever that ought to be done, signed or performed, or that in the opinion of my attorney ought to be done, signed or performed, of every nature and kind, as fully and effectually as I could do if personally present and acting.
>
> I expressly grant to my attorney in fact the authority to sell, and convey **real estate**; and, the power to execute and deliver deeds, notes, and deeds of trust, and all other instruments necessary or helpful with regard to the same.

(Bold in original). When the trial court's comment is read in context, there is no reason to believe that he was referring to, or even aware of, the language in the power of attorney reciting that "[m]y attorney may make gifts on my behalf."

Counsel for Joyce Son:	That's correct. But with that right, she has a fiduciary duty to protect and not to go outside and do wrong things. I think —
The Court:	That's true. There's no question about that.

* * *

The Court:	. . . I'm talking now about this power of attorney that [the deceased], his father, gave to his daughter, [Joyce Daughter]. And she – she conveyed certain property to —
Counsel for Joyce Son:	Her husband.
The Court:	– to her husband.
Counsel for Joyce Son:	And I think, your Honor —
The Court:	And you extrapolate from that, that she – she put it beyond, what? Beyond the reach of whom?
Counsel for Joyce Son:	Right. My client had a – was entitled to a child's share.
The Court:	I see.
Counsel for Joyce Son:	Now, if they had gotten up here and said, Well, [the husband of Joyce Daughter] paid dad ten thousand dollars for that land, or if there was some consideration given, I – I would not have a problem with it, or I wouldn't have grounds.
The Court:	What do you say about that, counsel?

Counsel for Joyce Daughter and her husband: I disagree. I don't think consideration activates a power of attorney. I don't think.

The Court: May not.

* * *

Counsel for Joyce Son: Your Honor, as I understand the law, she did nothing more than give her husband a gift of all this land, about twenty acres, a gift. As I read, and I could be reading this wrong, but this is – I mean, number one it makes sense that you can't, if you have a power of attorney, just go out and give anybody you want to, the person you have the power of attorney for's, stuff. You can't do that. But under 34-6-108 under [(c)(1)] it says – If your honor will permit me to read this.

The Court: Yes. Yeah.

Counsel for Joyce Son: Nothing contained in this section and 3[4]-6-109 shall be construed to vest an attorney in fact with, or authorize an attorney in fact, to exercise any of the following powers: Number one, make gifts, grants, or other transfers without consideration. And that is the safeguard built in this. Now I could be reading this wrong or something, but I think that makes perfect sense.

The Court: No. You're reading it right.

Counsel for Joyce Son: That you can't go out and just —

The Court: I know. I understand your position. What do you say, counsel, to that?

Counsel for Joyce Daughter and her husband:	The element of consideration has – borderlines on fraud. You can't – You can't fraudulently do this. But if you read the will, and it says in there that she is to get the property. She's to get the property.
The Court:	The will hasn't been probated, counsel. And, therefore, it has little or no efficacy. There's one problem you have there.
Counsel for Joyce Daughter and her husband:	All right. Does she have a legal right, as power of attorney, and her father says, I want you guys to have this property, can she convey? Yes, when she's a legal heir without consideration. That's long standing.
The Court:	Okay. All right.

In rendering its judgment with respect to Joyce Daughter's transfer of the deceased's 20 acres to her husband, the trial court stated the following:

> . . . The court [] finds that the position of [Joyce Son] with respect to the power of attorney executed by [the deceased] is likewise well taken. Using the power of attorney as a vehicle for that purpose, the attorney in fact conveyed that property to her husband without consideration and in gross violation of the statutes. So that deed will likewise be canceled, set aside, and for nothing held.

Joyce Daughter argues that the trial court erred in focusing on the language of Tenn. Code Ann. § 34-6-108(c)(1), which language provides, in pertinent part, that "[n]othing contained in [§ 34-6-108] and § 34-6-109 shall be construed to vest an attorney in fact with, or authorize an attorney in fact to exercise, . . . the . . . power[] . . . [to] [m]ake gifts, grants, or other transfers without consideration . . ." She contends that, since the power of attorney expressly granted her the power to "make gifts on [the deceaseds'] behalf," this provision of the power of attorney brings into play Tenn. Code Ann. § 34-6-108(b)(1), which, in effect, provides that a principal can expressly grant a power, *e.g.*, the power to make a "gift[], grant[], or other transfer[] without consideration," even though the subject grant is expressly excluded by the language of Tenn. Code Ann. § 34-6-108(c)(1). In summary, she argues that the deceased's express grant of the power to make a gift means that the

statutory language relied upon by the trial court – Tenn. Code Ann. § 34-6-108(c)(1) – is simply not applicable to the facts of the case.

As is abundantly clear from the transcript of the hearing below, the trial court was proceeding as if subsection (c)(1) of Tenn. Code Ann. § 34-6-108 applied to the facts of this case and that this latter code provision prohibited Joyce Daughter from transferring the 20-acre tract of property to her husband without consideration. Joyce Daughter takes exception to the trial court's approach. She argues that subsection (c)(1) does not apply and, in support of this argument, points to the language of the power of attorney and the "trumping" effect of subsection (b)(1) on subsection (c)(1). The problem with this argument is that it is clear from the record that *Joyce Daughter never called the trial court's attention to the language of the power of attorney giving her the power to "make gifts on my behalf" or to the provisions of Tenn. Code Ann. § 34-6-108(b)(1).* It was the obligation of Joyce Daughter to bring to the trial court's attention the position she now attempts to assert on this appeal. She certainly had the opportunity to present this argument because the trial court specifically asked her to respond to her adversary's argument, which argument was premised on subsection (c)(1). *See* Tenn. R. Ct. App. 6(a)(2) (requiring briefs to this Court to include "[a] statement showing how [the] alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded."); *see also* ***Henry County Bd. of Educ. v. Burton***, 538 S.W.2d 394, 397 (Tenn. 1976) (noting that "[c]ounsel are expected to assist the trial court at all stages of litigation."). In addressing the trial court's request, Joyce Daughter never raised the "gift" language of the power of attorney or the language of subsection (b)(1) of the statute. Instead, she argued that the language of subsection (c)(1) meant you "can't fraudulently do this." In her reply to the court, she also pointed out that she was to get the property in question under the deceased's will. Again, there was no mention made of the language of the power of attorney or the provisions of Tenn. Code Ann. § 34-6-108 (b)(1).

As an appellate court, we are obliged to review rulings of a trial court that are properly called to our attention by a party to an appeal. However, the Rules of Appellate Procedure clearly provide that we are not required to grant relief with respect to an error of the trial court if a complaining party "failed to take whatever action was reasonably available to prevent or nullify the harmful effects of an error." Tenn. R. App. P. 36(a). If Joyce Daughter is correct in her assertion regarding the effect of subsection (b)(1) on the facts of this case – and we will assume, without deciding, that she is – she could have "prevent[ed]" the "error" of the trial court from occurring by simply pointing out to the court that subsection (b)(1) rather than subsection (c)(1) controls the disposition of this case. Had she done so – and, again, assuming for the purpose of argument that she is correct – the trial court could have, and surely would have, corrected its error and moved on to the issue of undue influence. Accordingly, we elect to exercise the discretionary authority granted to us by Tenn. R. App. P. 36(a) by declining to reach the first prong of Joyce Daughter's issue pertaining to the basis of the trial court's decision.

As an alternative basis for relief on their first issue, Joyce Daughter and her husband argue that Tenn. Code Ann. § 34-6-110(a)(2001) authorized the transfer of the 20-acre tract of land to Mr. Grooms. This provision provides as follows:

> (a) If any power of attorney or other writing:
>
> (1) Authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do; or
>
> (2) Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or to deal with the principal's property; then the attorney-in-fact or agent shall have the power and authority to make gifts, in any amount, of any of the principal's property, to any individuals, or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of the federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. This section shall not in any way limit the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.

In a 2003 decision, we held that this statute permits an attorney in fact to make gifts of the principal's property "in accordance with the principal's personal history of making . . . lifetime gifts" in two situations – (1) if the power of attorney authorizes the attorney in fact "to do, execute or perform any act that the principal might or could do;" and (2) if the power of attorney "[e]vidences the principal's intent to give the attorney-in-fact . . . full power to handle the principal's affairs or to deal with the principal's property." ***Id.***; *see* ***Martin v. Moore***, 109 S.W.3d 305, 311 (Tenn. Ct. App. 2003), *perm. app. denied*, May 19, 2003.

Joyce Daughter and her husband did not mention this statute in their pleadings and it was never mentioned by them during the hearing below. It is well-settled that "[t]his Court can only consider such matters as were brought to the attention of the trial court and acted upon or [pretermitted] by the trial court." ***Stewart Title Guar. Co. v. FDIC***, 936 S.W.2d 266, 271 (Tenn. Ct. App. 1996) (quoting ***Irvin v. Binkley***, 577 S.W.2d 677, 679 (Tenn. Ct. App. 1978)). The subject issue was not raised below; therefore, it cannot be raised for the first time on appeal. ***Civil Servs. Merit Bd. v. Burson***, 816 S.W.2d 725, 734-35 (Tenn. 1991).[5] However, even had this issue been properly raised below, we could not grant relief based on the main thrust of the statute because the

[5] Our basis for refusing to entertain Joyce Daughter's argument with respect to Tenn. Code Ann. § 34-6-110(a) is somewhat different from, but related to, our reason for not allowing Joyce Daughter to make her Tenn. Code Ann. § 34-6-108(b)(1) argument. With respect to the former, the issue premised on Tenn. Code Ann. § 34-6-110(a) was *never* raised below; hence, it cannot be raised for the first time on appeal. On the other hand, the subject of Tenn. Code Ann. § 34-6-108 was very much before the trial court; but what is arguably a critical section of that code provision was not called to the trial court's attention when the court made a decision under another part of that statute. This presents a Tenn. R. App. P. 36(a) problem. It could be said that these two concepts, while somewhat different, are "first cousins" in nature.

record is devoid of any evidence reflecting that the deceased had a "personal history" of making lifetime gifts to his son-in-law, Joyce Daughter's husband. *See* ***Martin***, 109 S.W.3d at 311.

We recognize that the last sentence of Tenn. Code Ann. § 34-6-110(a) provides that

> [t]his section shall not in any way limit the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.

However, since this statute was not raised below, we cannot consider its main thrust *or* the effect of the last sentence of the statute on the facts before us.

V.

As an alternative basis for invalidating the deed to Joyce Daughter's husband, Joyce Son, in his brief, urges us to hold that there is, under the rubric of ***Matlock v. Simpson***, 902 S.W.2d 384 (Tenn. 1995), a presumption of undue influence as to the transfer of the 20 acres to the husband of Joyce Daughter. Joyce Son argues that there is no clear and convincing evidence of the fairness of the transaction sufficient to rebut the presumption. The trial court did not reach this issue; nor do we. We decline to address this matter because the only undue influence raised in Joyce Son's complaint is the undue influence that Joyce Daughter allegedly "exercis[ed]" over her father *in securing the execution of the power of attorney*. This is different from the undue influence alluded to in Joyce Son's brief.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellants, Helen Joyce Grooms and James Grooms.

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CHARLES D. SUSANO, JR., JUDGE